IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 4:05-CV-00329-TCK-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE'S RESPONSE IN OPPOSITION TO MOTION FOR PROTECTIVE ORDER

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, (hereinafter "the State"), and for its Response in Opposition to the Poultry Integrator Defendants' Motion for Protective Order (docket entry 540), submits the following:

ARGUMENTS AND AUTHORITIES

I. Burden of Proof

"Rule 26(c) requires that 'good cause' be shown for a protective order to be issued. The burden is therefore upon the movant to show the necessity of its issuance." *American Ben. Life Ins. Co. v. Ille,* 87 F.R.D. 540, 543 (W.D. Okla. 1978) (*citing General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974) and 8 Wright & Miller, *Federal Practice and Procedure: Civil* § 2035, at 264 (1970)).

II. Notice of the subpoenas was given well in advance of the inspection date

Some of the subject subpoenas were served commencing April 17, 2006, other subpoenas were served as late as April 20, 2006 and notice of service on Defendants was made April 21, 2006. *See* correspondence of Richard T. Garren including Letter of Transmittal, attached Exhibit "1." Notice to Defendants was served well in advance of the May 5, 2006, date for inspection and sampling identified in the subpoenas. Defendant's were clearly not prejudiced by the date of giving notice of the subpoenas as they filed their objection to the subpoenas on May 3, 2006. Defendant's statement of being prejudiced is wholly conclusory. "'Good cause' within the meaning of Rule 26(c) contemplates a 'particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.'" *American Ben. Life Ins. Co. v. Ille,* 87 F.R.D. 540, 543 (W.D. Okla. 1978).

Rule 45 states only that "[p]rior notice of any commanded . . . inspection of premises before trial shall be served on each party." The Court in *Ginley v. E.B. Mahoney Builders, Inc*, 2006 WL 266507 (E.D. Pa. 2006), noted earlier this year that "the definition of 'prior notice' remains surprisingly elusive." *Butler v. Biocore Med. Techs., Inc.*, 348 F.3d 1163, 1173 (10th Cir. 2003), interpreted the "prior notice" provision of Rule 45 to make sure that all parties received notice of a subpoena in plenty of time to object to it:

> [T]he 1991 Advisory Committee Notes to Rule 45 indicate that the purpose of the notice requirement is to provide opposing parties an opportunity to object to the subpoena. For an objection to be reasonably possible, notice must be given well in advance of the production date. Finally, we note that two other district courts have reached the same conclusion as the district court did below. We therefore agree that Rule 45(b)(1) requires notice to be given prior to service of a subpoena.

(Case citations omitted.)

In the present case, for the past six months the parties have known of the State's intention to conduct environmental sampling of Defendants' poultry litter and the pastureland on which the litter has been spread; and more to the point, the sole subject of the only Motion Hearing conducted in this case was the State's request to begin environmental sampling this Spring. The State specifically served notice of the Rule 45 subpoenas on Defendants two weeks prior to the inspection and sampling date. Defendants had ample time in which to file their objection, and they did so.

III. The subpoenas are sufficiently specific

Defendants complain that the subpoenas inadequately set forth the legal description of the property subject to inspection. However, the Subpoenas state that on the date and at the time of the inspection the State intends to identify those specific portions of the property where a grid will be placed and soil samples drawn at random, where edge of field samples will be taken. This is a determination that can only be made on site. *See* March 23, 2006 Transcript of Motion Hearing at 41.20 to 50.21, attached Exhibit "2" (detailing the manner in which waste, soil, rainfall runoff and groundwater samples will be collected).

Defendants also complain that following the date and time set forth in each subpoena, the State intends to periodically return for additional samples, such as those which will be required during periods of heavy rain. Defendants would have this Court instead fashion rigid dates and times unrelated to the very purpose for and conditions under which the samples are being gathered. In its control over the discovery process, the Court must take into account that the pollution at issue in this case is nonpoint source pollution which occurs during periods of rain.

> We are approaching another season when high levels of poultry litter will be applied to the land. The purpose of this motion here today . . . is to ask for an immediate order limited to allow discovery during this rainy season, March, April and May, so we can find out what the soil samples are, the runoff samples, and the water samples

during time of peak danger to the watershed.

Statement by Attorney General Drew Edmondson, March 23, 2006 Transcript of Motion. Hearing, at 12.25 to 13.8, attached Exhibit "2."

The degree of specificity for a discovery request "depends upon the facts and circumstances of each case." *United States v. IBM Corp.*, 83 F.R.D. 97, 107 (S.D.N.Y. 1979). The specificity required must be "'adequate, but not excessive, for the purposes of the relevant inquiry.'" *Id. (quoting Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 209 (1946)).

The number, type, location and other variables associated with environmental samples are dictated by the nature of the scientific inquiry and by the scientific process. As noted by this Court at the conclusion of the hearing on the State's Motion for Leave to Conduct Limited Expedited Discovery:

> The proper standard is good cause to justify discovery requests such as this. I think there is definitely good cause. This lawsuit is about whether or not the Illinois River watershed has been polluted by the application of chicken litter, so obviously the samples requested are relevant. And it would appear to me to be the more samples, the more information you're going to get to get a good answer to the question as to whether or not there has been harmful pollution.

(Emphasis added.) March 23, 2006 Transcript of Motion Hearing, at 82.11 to 82.18, attached Exhibit "2."

IV. The subpoenas are neither oppressive nor unduly burdensome

The nature and importance of the litigation at issue may justify imposing "a substantial burden of compliance" because "considerations of cost and burdensomeness must give way to the search for truth" in cases of public importance. *United States v. IBM Corp.*, 83 F.R.D. 97, 109 (S.D. N.Y. 1979). At the previously mentioned Motion Hearing in this case, defense counsel John Tucker acknowledged the high level of the public's interest in this case:

> [Plaintiff is] casting about with a very laudable objective, and General Edmondson, I think, spoke for everybody, he certainly spoke for me when he expressed his concern about Oklahoma's interest in protecting its watersheds.

March 23, 2006, Transcript of Motion Hearing at 75.12 to 75.16, attached Exhibit "2."

The burden which accompanies samples being taken from pastureland and from poultry litter can be categorized only as slight. "An evaluation of undue burden requires the court to weigh the burden to the subpoenaed party against the value of the information to the serving party." *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005) (*quoting Travelers Indem. Co. v. Metropolitan Life Ins. Co.*, 228 F.R.D. 111, 113 (D. Conn. 2005)).

Additionally, the State incorporates herein the arguments set forth on "undue burden" in its Response in Opposition to Tyson Chicken, Inc.'s Objection to and Motion to Quash Subpoena for Inspection and Sampling of Premises and Brief in Support filed contemporaneously herewith.

V. The State's proposed biosecurity measures are more than adequate

Defendants' request for a protective order regarding biosecurity is specious at best. During the counsel meeting April 25, 2006, at which counsel for Tyson and for certain Poultry Growers were present, specific and detailed discussions were had concerning the State's biosecurity measures. The subpoenas had been issued and served prior to this meeting, providing every opportunity for counsel to raise any legitimate concerns they had.

Moreover, in the months prior to the counsel meeting on April 25, 2006 and the recent exchange of correspondence dealing with biosecurity protocols, defense counsel was informed of the State's biosecurity protocols. The State sought samples from some of the same non-party growers subject to subpoenas in this matter in the Fall of 2005. At that time, Defense counsel for Tyson Chicken, Inc., Cobb-Vantress, Inc., George's, and Simmons Foods, Inc., were provided with a

document entitled "Poultry Premise Entry Biosecurity Protocols For Regulatory Personnel" along with an affidavit from Becky Brewer-Walker, D.V.M., the State Veterinarian and Animal Industry Division Director of the Oklahoma Department of Agriculture Food and Forestry[1]. In her affidavit Dr. Brewer-Walker states: "The Department has developed specific biosecurity protocols that are equivalent to biosecurity programs developed by Tyson Chicken, Inc., George's, Inc., Cobb-Vantress, Inc. and Simmons Foods, Inc."

Dr. Brewer-Walker further states that the guidelines are "sufficient to allow poultry operations to be safely sampled even under conditions where disease is present." For Defendants to now assert that the State has provided inadequate biosecurity guidelines is unwarranted, false, and misleading. Counsel for Tyson has been in possession of, and discussion concerning, biosecurity guidelines proposed by the State for months. The new and more stringent biosecurity protocols being urged by Defendants obfuscate the State's sampling efforts. Also important to note is the fact that these new protocols reflect a revision date of February 2006, months after being advised of the State's protocols and the same month that the State sought sampling in this case pursuant to its Motion for Expedited Discovery filed February 22, 2006 (Docket #210). Many requests have been made that Tyson furnish the biosecurity protocols that were in existence as of the date of the filing of this action. Those requests have been ignored.

The State has further proposed that sampling or testing conducted inside the poultry houses

[1] These materials were attached to a pleading, attached as Exhibit 3 hereto titled "Response To Motion of Simmons Foods, Inc., To Quash Or Modify Administrative Warrant and For Expedited Hearing and Answer Brief In Support". This document according to the certificate of service was mailed to each counsel on either November 7 or 8th, 2005.

be conducted when there is no flock present in the house. In other words, after a mature flock has gone on to the next step in the process and before a new flock is deposited in the house, the State would at that time conduct its testing and sampling. Defendants neither acknowledge nor address this proposal in their Motion for Protective Order.

Simply put, the State's biosecurity guidelines are adequate as evidenced by the affidavit of Dr. Brewer-Walker who is the authority on animal health biosecurity protocols related to the Agriculture Code in the State of Oklahoma. Additionally, the State incorporates herein the arguments set forth on biosecurity in its Response in Opposition to Tyson Chicken, Inc.'s Objection to and Motion to Quash Subpoena for Inspection and Sampling of Premises and Brief in Support filed contemporaneously herewith.

VI. The State is not required to post a bond

Defendants' request for a protective order requiring the State to post a bond as a condition precedent to any inspection and sampling should be summarily denied. As noted in the previous section, the State has proposed to sample poultry waste when there is no poultry present. This would obviate any concern about harm to the flocks.

Williams v. Continental Oil Co., 14 F.R.D. 58 (W.D. Okla. 1953), the case relied on by the Defendants, was reversed and remanded by the Tenth Circuit in *Williams v. Continental Oil Co.*, 215 F.2d 4 (10th Cir. 1954). In *Williams* the district court refused the plaintiffs' motion for an order allowing a subsurface directional survey - a highly invasive procedure - of an oil well that plaintiffs contended was taking oil from their land. 14 F.R.D. at 67. The court noted that the oil well was twenty-four years old, and might easily be damaged by such a subsurface directional survey. *Id.* at 66. If the well casing was broken or collapsed, it was "probable that the [well]

could not again be placed upon production." *Id.*

The Tenth Circuit reversed and allowed the survey, noting that the survey "was the only way to prove or disprove" the crucial fact essential to the right of plaintiffs to recover. 215 F.2d at 8. Moreover, the Tenth Circuit made no mention of the fact that a court could order a party to post a bond for any possible damage; in this case, the plaintiff had offered to post the bond, along with various other safeguards to prevent any untoward events that might possibly come from the subsurface directional survey. *Id.* at 5. Thus, Tyson's reliance on the district court's decision in Williams is doubly unwarranted: the decision was overruled, and the court did not order a bond to be posted.

Likewise, *Micro Chemical, Inc. v. Lextron, Inc.*, 193 F.R.D. 667 (D. Colo. 2000) provides no support for the proposition that discovery should be conditioned on the posting of a security bond. In *Lextron*, plaintiff wanted to alter defendant's machine in a patent dispute. The court refused, noting that if plaintiffs wanted to alter a machine such as the one in question, they could simply go out and purchase one and do all the tests they wanted. *Id.* at 668. Obviously, *Lextron* has no applicability to the present case.

Additionally, the State incorporates herein the arguments set forth regarding "the bond issue" in its Response in Opposition to Tyson Chicken, Inc.'s Objection to and Motion to Quash Subpoena for Inspection and Sampling of Premises and Brief in Support filed contemporaneously herewith.

VII. Conclusion

Defendants have not met their burden to show "good cause" for a protective order to be issued. Accordingly, the Poultry Integrator Defendants' Motion for Protective Order should be denied.

Respectfully Submitted,

W.A. Drew Edmondson (OBA 2628)
Attorney General
Kelly H. Burch (OBA #17067)
J. Trevor Hammons (OBA #20234)
Assistant Attorneys General
State of Oklahoma
2300 North Lincoln Boulevard, Suite 112
Oklahoma City, OK 73105
(405) 521-3921

C. Miles Tolbert, OBA #
Secretary of the Environment

State of Oklahoma
3800 North Classen
Oklahoma City, Ok 73118
(405) 530-8800

/s/ Richard T. Garren
M. David Riggs (OBA #7583)
Joseph P. Lennart (OBA #5371)
Richard T. Garren (OBA #3253)
Douglas A. Wilson (OBA #13128)
Sharon K. Weaver (OBA #19010)
Riggs, Abney, Neal, Turpen,
Orbison & Lewis
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

James Randall Miller, OBA #6214
David P. Page, OBA #6852
Louis Werner Bullock, OBA #1305
Miller Keffer & Bullock
222 S. Kenosha
Tulsa, Ok 74120-2421
(918) 743-4460
Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2006, I electronically transmitted the attached document to the following ECF registrants:

Jo Nan Allenjonanallen@yahoo.com bacaviola@yahoo.com

Frederick C Bakerfbaker@motleyrice.com
mcarr@motleyrice.com;fhmorgan@motleyrice.com

Tim Keith Bakertbakerlaw@sbcglobal.net

Douglas L Boyddboyd31244@aol.com

Vicki Bronsonvbronson@cwlaw.com lphillips@cwlaw.com

Paula M Buchwaldpbuchwald@ryanwhaley.com loelke@ryanwhaley.com

Louis Werner BullockLBULLOCK@MKBLAW.NET
NHODGE@MKBLAW.NET;BDEJONG@MKBLAW.NET

Lloyd E Cole, Jrcolelaw@alltel.net gloriaeubanks@alltel.net;amy_colelaw@alltel.net

Angela Diane Cotner AngelaCotnerEsq@yahoo.com

John Brian DesBarresmrjbdb@msn.com JohnD@wcalaw.com

W A Drew Edmondsonfc_docket@oag.state.ok.us
drew_edmondson@oag.state.ok.us;suzy_thrash@oag.state.ok.us.

Delmar R Ehrichdehrich@faegre.com
kcarney@faegre.com;;qsperrazza@faegre.com;kklee@faegre.com

John R Elrodjelrod@cwlaw.com vmorgan@cwlaw.com

William Bernard Federmanwfederman@aol.com
law@federmanlaw.com;ngb@federmanlaw.com

Bruce Wayne Freemanbfreeman@cwlaw.com lcla@cwlaw.com

Ronnie Jack Freemanjfreeman@grahamfreeman.com

Richard T Garrenrgarren@riggsabney.com dellis@riggsabney.com

Dorothy Sharon Gentrysgentry@riggsabney.com jzielinski@riggsabney.com

Robert W Georgerobert.george@kutakrock.com donna.sinclair@kutakrock.com

Tony Michael Grahamtgraham@grahamfreeman.com

James Martin Gravesjgraves@bassettlawfirm.com

Michael D Gravesmgraves@hallestill.com
jspring@hallestill.com;smurphy@hallestill.com

Thomas James Grevertgrever@lathropgage.com

Jennifer Stockton Griffinjgriffin@lathropgage.com

Carrie Griffithgriffithlawoffice@yahoo.com

John Trevor Hammonsthammons@oag.state.ok.us
Trevor_Hammons@oag.state.ok.us;Jean_Burnett@oag.state.ok.us

Michael Todd Hembreehembreelaw1@aol.com traesmom_mdl@yahoo.com

Theresa Noble Hillthillcourts@rhodesokla.com mnave@rhodesokla.com

Philip D Hixon Phixon@jpm-law.com

Mark D Hopsonmhopson@sidley.com dwetmore@sidley.com;joraker@sidley.com

Kelly S Hunter Burchfc.docket@oag.state.ok.us
kelly_burch@oag.state.ok.us;jean_burnett@oag.state.ok.us

Stephen L Jantzensjantzen@ryanwhaley.com
mantene@ryanwhaley.com;loelke@ryanwhaley.com

Mackenzie Lea Hamilton Jessiemaci.tbakerlaw@sbcglobal.net
tbakerlaw@sbcglobal.net;macijessie@yahoo.com

Bruce Jonesbjones@faegre.com jintermill@faegre.com;bnallick@faegre.com

Jay Thomas Jorgensenjjorgensen@sidley.com noman@sidley.com

Krisann C. Kleibacker Leekklee@faegre.com mlokken@faegre.com

Raymond Thomas Layrtl@kiralaw.com dianna@kiralaw.com;niccilay@cox.net

Nicole Marie Longwell Nlongwell@jpm-law.com ahubler@jpm-law.com

Linda C Martinlmartin@dsda.com mschooling@dsda.com

Archer Scott McDaniel Smcdaniel@jpm-law.com jwaller@jpm-law.com

Robert Park Medearis, Jrmedearislawfirm@sbcglobal.net

James Randall Millerrmiller@mkblaw.net smilata@mkblaw.net;clagrone@mkblaw.net

Robert Allen Nancernance@riggsabney.com jzielinski@riggsabney.com

John Stephen Neassteve_neas@yahoo.com

George W Owensgwo@owenslawfirmpc.com ka@owenslawfirmpc.com

David Phillip Pagedpage@mkblaw.net smilata@mkblaw.net

Marcus N Ratcliffmratcliff@lswsl.com sshanks@lswsl.com

Robert Paul Redemannrredemann@pmrlaw.net scouch@pmrlaw.net

Melvin David Riggsdriggs@riggsabney.com pmurta@riggsabney.com

Randall Eugene Roserer@owenslawfirmpc.com ka@owenslawfirmpc.com

Patrick Michael Ryanpryan@ryanwhaley.com
jmickle@ryanwhaley.com;kshocks@ryanwhaley.com

Robert E Sandersrsanders@youngwilliams.com

David Charles Sengerdsenger@pmrlaw.net scouch@pmrlaw.net

Jennifer Faith Sherrilljfs@federmanlaw.com
law@federmanlaw.com;ngb@federmanlaw.com

William Francis Smithbsmith@grahamfreeman.com

Colin Hampton Tuckerchtucker@rhodesokla.com scottom@rhodesokla.com

John H Tuckerjtuckercourts@rhodesokla.com

R Pope Van Cleef, Jrpopevan@robertsonwilliams.com
kirby@robertsonwilliams.com;kmo@robertsonwilliams.com

Kenneth Edward Wagnerkwagner@lswsl.com sshanks@lswsl.com

David Alden Wallswallsd@wwhwlaw.com lloyda@wwhwlaw.com

Elizabeth C Wardlward@motleyrice.com

Sharon K Weaversweaver@riggsabney.com msmith@riggsabney.com

Timothy K Webstertwebster@sidley.com jwedeking@sidley.com;ahorner@sidley.com

Gary V Weeks

Adam Scott Weintraubadlaw@msn.com

Terry Wayen Westterry@thewestlawfirm.com

Dale Kenyon Williams, Jrkwilliams@hallestill.com

jspring@hallestill.com;smurphy@hallestill.com

Edwin Stephen Williamssteve.williams@youngwilliams.com

Douglas Allen Wilson Doug_Wilson@riggsabney.com pmurta@riggsabney.com

J Ron Wrightron@wsfw-ok.com susan@wsfw-ok.com

Lawrence W Zeringuelzeringue@pmrlaw.net scouch@pmrlaw.net

I further certify that on May 8, 2006, I served the foregoing document by U.S. Postal Service, postage prepaid, on the following, who are not registered participants of the ECF System:

Jim Bagby
RR 2, Box 1711
Westville, OK 74965

Gordon W. Clinton
23605 S GOODNIGHT LN
WELLING, OK 74471

Susann Clinton
23605 S GOODNIGHT LN
WELLING, OK 74471

Eugene Dill
P O BOX 46
COOKSON, OK 74424
Marjorie Garman
5116 Highway 10

Tahlequah, OK 74464

James C Geiger
RT 1 BOX 222
KANSAS, OK 74347

Thomas C Green
Sidley Austin Brown & Wood LLP
1501 K ST NW
WASHINGTON, DC 20005

G Craig Heffington
20144 W SIXSHOOTER RD
COOKSON, OK 74427

John E. and Virginia W. Adair Family Trust
RT 2 BOX 1160
STILWELL, OK 74960

Dorothy Gene Lamb
Route 1, Box 253
Gore, OK 74435

James Lamb
Route 1, Box 253
Gore, OK 74435

Dara D Mann
Faegre & Benson (Minneapolis)
90 S 7TH ST STE 2200
MINNEAPOLIS, MN 55402-3901

Doris Mares
Charles L Moulton
323 CENTER ST STE 200
LITTLE ROCK, AR 72201

William H Narwold
Motley Rice LLC (Hartford)
20 CHURCH ST 17TH FLR
HARTFORD, CT 06103

Donna S Parker
34996 S 502 RD
PARK HILL, OK 74451

Richard E Parker
Rt 2, Box 370
Watts, OK 74964

P O BOX 46
COOKSON, OK 74424

Teresa Brown Marks
323 CENTER ST STE 200
LITTLE ROCK, AR 72201

34996 S 502 RD
PARK HILL, OK 74451

Monte W Strout
209 W Keetoowah
Tahlequah, OK 74464

C Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 NORTH CLASSEN
OKLAHOMA CITY, OK 73118

Robin L. Wofford

s/ Richard T. Garren